

1 Marcia Hofmann (SBN 250087)  
2 *marcia@eff.org*  
3 ELECTRONIC FRONTIER FOUNDATION  
4 454 Shotwell Street  
5 San Francisco, CA 94110  
6 Telephone: (415) 436-9333  
7 Facsimile: (415) 436-9993

8 Jason M. Schultz (SBN 212600)  
9 *jschultz@law.berkeley.edu*  
10 SAMUELSON LAW, TECHNOLOGY AND PUBLIC  
11 POLICY CLINIC  
12 U.C. Berkeley School of Law  
13 396 Simon Hall  
14 Berkeley, CA 94720-7200  
15 Telephone: (510) 642-0499  
16 Facsimile: (510) 643-4625

17 Attorneys for Plaintiff  
18 Electronic Frontier Foundation

19 IN THE UNITED STATES DISTRICT COURT  
20 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
21 SAN FRANCISCO DIVISION

22 ELECTRONIC FRONTIER FOUNDATION,	)	Case No. 3:09-CV-05640-SI
23	)	
24 Plaintiff,	)	
25	)	JOINT CASE MANAGEMENT
26 vs.	)	STATEMENT
27	)	
28 DEPARTMENT OF DEFENSE, ET AL.,	)	Judge: Hon. Susan Illston
29	)	Date: March 12, 2010
30 Defendants.	)	Time: 2:00 p.m.
31	)	Place: Courtroom 10, 19 <sup>th</sup> Floor
32	)	
33	)	
34	)	

35 Plaintiff Electronic Frontier Foundation (“EFF”) and Defendants Department of Defense  
36 (“DOD”), Department of Homeland Security (“DHS”), Department of Justice (“DOJ”),  
37 Department of the Treasury (“Treasury”), Central Intelligence Agency (“CIA”), and Office of the  
38 Director of National Intelligence (“ODNI”) respectfully submit the following joint case  
39 management statement.

1           **1.       Jurisdiction and Related Issues**

2           The parties stipulate and agree that (1) venue is properly laid in this District under 5 U.S.C.  
3   § 552(a)(4)(B); and (2) that the Court has subject matter jurisdiction over the action pursuant to 28  
4   U.S.C. § 1331, except that defendants reserve the right to challenge the Court's subject matter  
5   jurisdiction with regard to EFF's FOIA claims against certain defendants.

6           **2.       Facts**

7           In a series of letters sent by facsimile on October 7 and 8, 2009, plaintiff submitted  
8   Freedom of Information Act ("FOIA") requests to the defendant federal agencies, including ODNI;  
9   CIA; Treasury's component the Internal Revenue Service ("IRS"); DHS's component the Secret  
10   Service; DOD and DOD's components the Inspector General, Defense Intelligence Agency, Air  
11   Force, and Navy; and DOJ's components the Criminal Division, Federal Bureau of Investigation  
12   ("FBI"), Drug Enforcement Administration ("DEA"), Bureau of Alcohol, Tobacco, Firearms and  
13   Explosives ("ATF"), and Executive Office for U.S. Attorneys ("EOUSA"). In each FOIA request,  
14   EFF sought disclosure of federal guidelines on the use of social-networking websites for  
15   investigative or data gathering purposes created since January 2003.

16           By letter dated November 27, 2009, EOUSA stated that it had located fifteen pages in  
17   response to EFF's request, which were withheld in full pursuant to 5 U.S.C. §§ 552(b)(2), b(5), and  
18   (b)(7)(C).

19           By letter dated November 27, 2009, ATF informed EFF that it had located no records  
20   responsive to EFF's request.

21           By letter dated December 17, 2009, the DOD Inspector General informed EFF that it had  
22   located no records responsive to EFF's request.

23           By letter dated January 11, 2010, the IRS produced five documents responsive to EFF's  
24   request, including three that were already publicly available. The agency withheld no material in  
25   the responsive documents.

26           By letter dated February 1, 2010, DEA informed EFF that it had located no records  
27   responsive to EFF's request.

28           By letter dated March 3, 2010, the Criminal Division partially produced a thirty-three page

1 document responsive to EFF's FOIA request.

2 To date, the remaining defendant agencies and components have not issued final responses  
3 to EFF's FOIA requests, though they maintain that they all are currently processing EFF's FOIA  
4 requests and seeking to provide a production timeline to plaintiff.

### 5 **3. Legal Issues**

6 This case presents a procedural issue concerning the timing of defendants' processing of  
7 EFF's FOIA requests. Once the various defendant agencies complete processing, the remaining  
8 legal issue is whether defendants have properly withheld records in whole or part under 5 U.S.C. §  
9 552. EFF reserves the right to challenge the adequacy of defendants' searches for responsive  
10 records after the government completes processing of EFF's requests and after it files declarations  
11 or indices pursuant to *Vaughn v. Rosen*, 484 F.2d 820, 826-8 (D.C. Cir. 1973). Defendants also  
12 reserve the right to challenge the Court's subject matter jurisdiction with regard to EFF's FOIA  
13 claims against certain defendants.

### 14 **4. Motions**

15 The parties anticipate that this case is likely to be disposed of on dispositive motions. The  
16 parties submit, however, that scheduling any such motion is premature at this time. The parties are  
17 currently working in good faith to resolve some of the claims and issues in this action. If the  
18 parties are unable to negotiate a processing schedule for the FOIA requests that remain  
19 unanswered, EFF anticipates that it may file a motion for partial summary judgment on the issue of  
20 timely processing against some of the defendants. While the parties are continuing to resolve the  
21 timing of motions, defendants also reserve the right to seek leave of the Court to file more than one  
22 dispositive motion, which may be necessary in light of the large number of defendants in this case  
23 and the defendants' varying responses to EFF's FOIA requests.

### 24 **5. Amendment of Pleadings**

25 No party anticipates amending its pleadings to add or dismiss claims or defenses.

### 26 **6. Evidence Preservation**

27 Counsel have discussed evidence preservation and have explained this obligation to the  
28 parties. The government is taking all reasonable steps to preserve documents responsive to EFF's

1 FOIA requests that were located during the course of the government's search process, including  
2 those documents withheld from EFF.

3 **7. Disclosures**

4 The parties agree and stipulate under Federal Rule of Civil Procedure 26(a)(1)(A) that  
5 initial disclosures are not necessary, as this is a FOIA action for which there is no need to  
6 exchange.

7 **8. Discovery**

8 To date, no discovery has been taken by any party. The parties do not anticipate proposing  
9 any limitations or modifications of the discovery rules. EFF reserves the right to seek discovery  
10 pursuant Federal Rule of Civil Procedure 56(f) after the government files its motion for summary  
11 judgment and supporting *Vaughn* declarations or indices. Defendants contend that discovery is  
12 generally not appropriate in FOIA actions. *See Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th  
13 Cir. 2008) (stating that in FOIA "cases courts may allow the government to move for summary  
14 judgment before the plaintiff conducts discovery").

15 **9. Class Actions**

16 This case is not a class action.

17 **10. Related Cases**

18 There are no related cases pending before this Court as defined by Local Rule 3-12.

19 **11. Relief**

20 EFF seeks injunctive relief with respect to the release and disclosure of all records  
21 responsive to its October 7 and 8, 2009 FOIA requests. EFF also seeks expeditious proceedings in  
22 this action pursuant to 28 U.S.C. § 1657(a) as well as reasonable attorney's fees incurred in this  
23 litigation. Defendants deny that plaintiff is entitled to the relief requested, or to any relief  
24 whatsoever, and is furthermore not entitled to expeditious proceedings in this action.

25 **12. Settlement and ADR**

26 The parties believe that the prospect of settlement is low at this time. This case has been  
27 assigned to the ADR Multi-Option Program, and the parties have conferred about ADR processes  
28 in conformance with ADR Local Rule 3-5. The parties believe that this case is not well suited to

1 ADR resolution, and therefore have filed a Notice of Need for ADR Phone Conference pursuant to  
2 ADR Local Rule 3-5(c)(2). (Dkt. No. 10.) The phone conference has been scheduled for March 8,  
3 2010. The parties do intend, however, to meet and confer upon the conclusion of each agency's  
4 processing in an attempt to narrow the issues in dispute before presenting any such issues to the  
5 Court.

6 **13. Consent to Magistrate for All Purposes**

7 The parties have not agreed to consent to assignment of this case to a magistrate judge for  
8 all purposes.

9 **14. Other References**

10 The parties agree that this case is not suitable for reference to binding arbitration or a  
11 special master, or reference to the Judicial Panel on Multidistrict Litigation.

12 **15. Narrowing of Issues**

13 The parties have not agreed to narrow the legal issues remaining in this case at this time.  
14 No party requests bifurcation of any issues, claims, or defenses. As noted above, the parties  
15 anticipate that they will meet and confer upon the completion of each agency's processing in an  
16 attempt to narrow any issues in dispute before bringing any such dispute before the Court.

17 **16. Expedited Schedule**

18 The parties anticipate that this case will be resolved by the Court on summary judgment,  
19 but have been unable to negotiate a mutually agreeable schedule. EFF maintains that, because time  
20 is at the essence of both its rights and the government's obligations, this case should be handled on  
21 an expeditious basis with streamlined procedures. Defendants disagree and believe that this case  
22 can be litigated in the normal course, as is customary in FOIA actions. The parties anticipate that,  
23 upon the completion of each agency's processing, they will meet and confer in an attempt to  
24 narrow any issues, and any remaining areas of dispute will be presented to the Court by one or  
25 more motions for summary judgment. Defendants are committed to working with plaintiff to  
26 narrow and resolve issues as expeditiously as possible.

27 **17. Scheduling**

28 See paragraph 16 above.

**18. Trial**

The parties anticipate that this entire case will be resolved by the Court on dispositive motions, and do not anticipate that this case will be decided by a jury.

**19. Disclosure of Non-Party Interested Entities or Persons**

EFF filed a Certification of Interested Entities or Persons as required by Local Rule 3-16 stating that, aside from the named parties, there is no interest to report. (Dkt. No. 2.) Defendants have not filed a Certification of Interested Entities or Persons because Local Rule 3-16 excuses government entities or their agencies from this requirement.

**20. Other Matters As May Facilitate the Just, Speedy and Inexpensive Disposition of This Matter**

None.

DATED: March 5, 2010

Respectfully submitted,

/s/ Marcia Hofmann  
ELECTRONIC FRONTIER FOUNDATION  
Marcia Hofmann, Esq.  
454 Shotwell Street  
San Francisco, CA 94110  
Telephone: (415) 436-9333  
Facsimile: (415) 436-9993

TONY WEST  
Assistant Attorney General  
  
ELIZABETH J. SHAPIRO  
Deputy Branch Director

SAMUELSON LAW, TECHNOLOGY  
AND PUBLIC POLICY CLINIC  
Jason M. Schultz  
U.C. Berkeley School of Law  
396 Simon Hall  
Berkeley, CA 94720-7200  
Telephone: (510) 642-0499  
Facsimile: (510) 643-4625

/s/ Kimberly L. Herb  
Kimberly L. Herb  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave. NW  
Washington, DC 20530  
Telephone: (202) 305-8356  
Facsimile: (202) 616-8470  
E-mail: Kimberly.L.Herb@usdoj.gov

Attorneys for Plaintiff

Attorneys for Defendants

**GENERAL ORDER NO. 45(X) CERTIFICATION**

I attest that I have obtained Kimberly L. Herb's concurrence in the filing of this document.

/s/ Marcia Hofmann  
Marcia Hofmann